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No. 94-1134

In the Supreme Court of the United States

OCTOBER TERM, 1994

JEAN DEHAINAUT, ETC., ET AL., PETITIONERS

v.

FEDERICO PENA, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming dismissal of petitioners' claim that the Office of Personnel Management's policy of indefinitely barring them from future employment with the Federal Aviation Administration and related agencies because of illegal strike activity constitutes an unconstitutional bill of attainder.

2. Whether the President had the statutory authority to direct the Office of Personnel Management to implement an indefinite debarment policy with respect to fired air traffic controllers who had participated in an illegal strike.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-5a, 6a-23a) is reported at 32 F.3d 1066. The opinion of the district court (Pet. App. 24a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1994. A petition for rehearing was denied on September 28, 1994. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on December 27, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are former Federal Aviation Administration (FAA) air traffic controllers who were fired because of their participation in the unlawful August, 1981, strike called by the Professional Air Traffic Controllers Organization (PATCO). In this case, petitioners filed suit against the Secretary of Transportation, the Administrator of the FAA and the Director of the Office of Personnel Management (OPM), claiming that OPM's policy of indefinitely barring them from future employment with the FAA and related agencies constituted a bill of attainder, an *ex post facto* law, and a violation of due process and equal protection. The United States District Court for the Northern District of Illinois dismissed petitioners' complaint pursuant to Fed. R. Civ. P. 12(b). The court of appeals affirmed. Pet. App. 3a-5a, 6a-23a.

1. At the outset of the PATCO strike, then-President Reagan announced that striking controllers would be fired if they failed to return to work within forty-eight hours. Pet. App. 8a. OPM then issued a bulletin stating that fired controllers would be debarred from employment with the federal government for three years. *Ibid.*[1]

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[1] Under 5 U.S.C. 7311(3), individuals who "participate[] in a strike" against the government "may not accept or hold a position in the Government of the United States." This provision was in effect at the time of the PATCO strike, as was an OPM regulation that provided in pertinent part: "When a person is disqualified for any reason named in [5 C.F.R.] § 731.202, OPM, in its discretion, may deny that person examination for and appointment to a competitive position for a period of not more than 3 years." 5 C.F.R. 731.303 (1981). The reasons for disqualification enumerated in the regulations included those provided by 5 U.S.C. 7311. See 5 C.F.R. 731.202(b)(8) (1981).

On December 9, 1981, however, President Reagan directed OPM to modify this policy. *Ibid.* The President's directive provided that the fired controllers "should be permitted to apply for federal employment outside the scope of their former employing agency." *Ibid.* (quoting 17 Weekly Comp. Pres. Doc. 1364 (Dec. 9, 1981)). The President added, however, that the fired controllers "should not be deemed suitable for employment with the Federal Aviation Administration." Pet. App. 9a (quoting 17 Weekly Comp. Pres. Doc. 1364 (Dec. 9, 1981)).

OPM implemented President Reagan's directive by issuing a bulletin providing that the fired controllers "shall be determined not to be suitable for reinstatement or appointment in any position in the FAA," but that they would be considered for federal employment outside the FAA. Pet. App. 10a (quoting Federal Personnel Manual Bulletin 731-6). OPM subsequently clarified this debarment policy in a new bulletin providing that "the debarment period imposed by the President against reemployment of discharged controllers within the scope of the FAA is indefinite in duration and extends to positions in the FAA and closely related facilities." *Id.* at 11a (emphasis omitted).

2. In September, 1984, two fired controllers seeking reemployment with the FAA filed an action before the Merit Systems Protection Board (MSPB) after OPM denied them favorable suitability determinations in compliance with the President's directive and OPM's second bulletin. See *Wagner* v. *OPM*, 783 F.2d 1042, 1044 (Fed. Cir.), cert. denied, 477 U.S. 906 (1986). The MSPB certified the lawsuit as a class action on behalf of more than 400 fired controllers who had unsuccessfully sought reemployment with the FAA. *Ibid.* The MSPB upheld OPM's determination that the fired controllers were

indefinitely barred from future FAA employment, and the Federal Circuit affirmed. *Id.* at 1044-1046. The *Wagner* Court held that OPM correctly interpreted the President's December 9, 1981, directive, and that, even if the President's directive had been unclear, it was appropriate to defer to the interpretation of the Director of OPM. *Id.* at 1045. The court also held that the federal statute making strikes against the government unlawful did not limit the debarment of the fired strikers to three years; to the contrary, the court found that Congress intended that strikers be debarred from federal employment indefinitely. *Id.* at 1045-1046. This Court denied the strikers' petition for certiorari. 477 U.S. 906 (1986).

3. Ten years after the strike, petitioners filed the present action, alleging that OPM's indefinite bar on their reemployment with the FAA was unconstitutional because it was a bill of attainder, an *ex post facto* law, and a violation of due process and equal protection. Pet. App. 11a. Prior to the district court's decision, President Clinton lifted the indefinite debarment with respect to the fired controllers. *Id.* at 11a n.2. Petitioners' claims did not become moot, however, because they continued to seek back pay and attorney's fees. *Ibid.*

The district court granted respondents' motion to dismiss petitioners' complaint, relying in large part on the reasoning in *Wagner* v. *OPM*, *supra*, and *Korte* v. *OPM*, 797 F.2d 967 (Fed. Cir. 1986), which rejected claims virtually identical to those raised by petitioners. Pet. App. 26a-27a. The district court held that the challenged policy was not a bill of attainder because neither OPM's debarment policy nor President Reagan's directive established the "guilt" of any of the fired controllers. *Id.* at 30a. In addition, the court concluded that, because OPM's policy was an executive rather than

a legislative action, it did not fall within the purview of the Bill of Attainder Clause. *Id.* at 30a-31a.

The district court rejected petitioners' due process claim, holding that, even assuming that the claim implicated a constitutionally protected liberty or property interest, OPM's adjudicative finding at the time of the strike that petitioners were strike participants fully satisfied the requirements of due process. Pet. App. 32a.

The district court also held that OPM's debarment policy was not an *ex post facto* law because it did not impose criminal sanctions, Pet. App. 31a, and that the reason for the indefinite debarment policy—"that permitting discharged controllers to return to the FAA would be detrimental both to the efficiency of the FAA's operations and to the safe and effective performance of the nation's air traffic control system"—was rationally related to the policy itself, so as to satisfy equal protection concerns. *Id.* at 33a-34a.

4. The court of appeals affirmed. Pet. App. 3a-5a, 6a-23a. The court did not decide the question whether an agency policy implementing a Presidential directive could be "the functional equivalent of a legislative enactment for bill of attainder purposes." *Id.* at 13a. Instead, it held that, even assuming that the Bill of Attainder Clause is applicable to executive policies, "OPM's action is not 'punishment' as that term has been defined in the context of bills of attainder." *Id.* at 14a.

The court of appeals affirmed dismissal of petitioners' due process claim on the grounds relied upon by the district court. Pet. App. 21a-22a. In so doing, the court held that President Reagan had the statutory authority to direct OPM to implement the indefinite debarment policy, and that, by imposing the debarment, OPM was simply following the President's instructions. *Id.* at 20a.

The court of appeals agreed with the district court that OPM's policy could not be an *ex post facto* law because it did not impose criminal sanctions (Pet. App. 18a-19a), and it upheld the district court's determination that OPM's policy did not violate petitioners' equal protection rights, finding that "the explanations offered in the presidential directive advanced the legitimate governmental objectives of safety and efficiency in the administration of our nation's air traffic." *Id.* at 23a.

ARGUMENT

1. Petitioners contend (Pet. 8) that the court of appeals improperly "proceeded to try the evidentiary issues in the case" when it determined that their complaint failed to satisfy the "punishment" requirement of this Court's bill of attainder jurisprudence. This contention is incorrect.

In determining whether a legislative enactment inflicts punishment as contemplated by the Bill of Attainder Clause, this Court has employed a three-part test, inquiring

> (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes"; and (3) whether the legislative record "evinces a congressional intent to punish."

Selective Service System v. *Minnesota Public Interest Research Group*, 468 U.S. 841, 852 (1984) (quoting *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 475-476, 478 (1977)).

In the case at bar, the court of appeals found that petitioners' allegations satisfied the first prong of this

analysis because the exclusion of certain groups or individuals from participation in designated types of employment falls within the historical meaning of legislative punishment. Pet. App. 14a-15a. The court concluded, however, that petitioners' allegations did not satisfy the second and third prongs of the inquiry.

The court identified a nonpunitive legislative motivation from the face of the executive action at issue in the President's "determin[ation] that the intermingling of controllers who had been fired for striking with those who had replaced them would interfere with the safety and efficiency of the FAA's operations." Pet. App. 16a. The court also concluded that neither the averments of the complaint nor the executive action at issue supported an inference of punitive intent. *Id.* at 5a, 17a.

Each of those determinations represents a legal conclusion well within the court's proper role in reviewing the dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b)(6). As the court of appeals acknowledged, it was bound to "accept as true all well-pleaded facts in the complaint and draw all reasonable inferences in the light most favorable to the plaintiffs." Pet. App. 11a-12a. See, *e.g.*, *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). Having done so, it came to the conclusion that the government action challenged by petitioners did not amount to a bill of attainder.

Bill of attainder claims, like all others, are susceptible to dismissal for failure to state a claim upon which relief can be granted. See *DeVeau* v. *Braisted*, 363 U.S. 144, 160 (1960) (opinion of Frankfurter, J.) (affirming judgment on the pleadings and dismissal of appellants' bill of attainder claim on ground that the statute in question conveyed no independent implication of guilt). The courts of appeals have routinely applied this Court's three-pronged "punishment" inquiry in reviewing the

dismissal of such claims pursuant to Rule 12(b)(6). See, *e.g.*, *Fresno Rifle & Pistol Club, Inc.* v. *Van De Kamp*, 965 F.2d 723, 728 (9th Cir. 1992) (finding failure to satisfy punishment requirement based on language and structure of challenged enactment); *Little* v. *City of North Miami*, 805 F.2d 962, 966 (11th Cir. 1986) (finding the punishment requirement to be satisfied by allegations of complaint, but affirming dismissal on other grounds).[2]

The court of appeals' determination was, moreover, clearly correct on the merits. Petitioners' complaint, C.A. App. 13-22, failed to aver that the President or OPM acted with punitive intent, and both the President's directive and OPM's execution of it "reasonably can be said to further nonpunitive [executive] purposes." *Nixon*, 433 U.S. at 475-476. Under established law, the court of appeals correctly determined that petitioners "[could] prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley*, 355 U.S. at 45-46. Nor did OPM's indefinite debarment policy determine "guilt" without a "judicial trial" for purposes

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[2] Petitioners place much emphasis (Pet. 7-8) on the court of appeals' conclusion that "the administrative record does not permit even a reasonable inference, let alone 'unmistakable evidence,' of punitive intent." Pet. App. 5a. Viewed in context, it is evident that, in referring to the "administrative record," the court was referring to allegations in petitioners' complaint regarding the events leading up to the executive action at issue. See Pet. App. 17a (referring to ¶ 22 of petitioners' complaint); C.A. App. 14-17 (¶¶ 8-29 of complaint).

Petitioners also contend that the court of appeals erred by affirming dismissal of their claim after finding a "*prima facie* violation" of the Bill of Attainder Clause. Pet. 7. Nowhere in its opinion, however, does the court of appeals find that petitioners stated a *prima facie* case. Rather, the court concluded that petitioners had satisfied some, but not all, of the requirements of a bill of attainder claim.

of the Bill of Attainder Clause. Pet. App. 30a. As the Federal Circuit explained in *Korte* v. *OPM*, 797 F.2d 967 (1986), prior to the PATCO strike, 5 U.S.C. 7311(3) prohibited strikes against the government. 797 F.2d at 972. Thus, the only possible determination of "guilt" at issue here would be a determination about whether petitioners participated in the strike. This determination was made in individual adjudicative proceedings before the Merit Systems Protection Board at the time of the strike, and petitioners do not contest the validity of those proceedings in this case. See *ibid.*; Pet. App. 30a.

2. Petitioners also argue that the court of appeals erred in its determination that the President had statutory authority to issue a directive instructing OPM to implement an indefinite debarment policy.

Petitioners do not dispute that 5 U.S.C. 7311(3) indefinitely bars from federal employment any person who participates in a strike against the United States government. As the court of appeals explained,

> [e]ven if an existing regulation, such as 5 C.F.R. § 731.303, applies a more lenient policy than that allowed by statute, the President, acting under his statutory authority to regulate federal employment, *see e.g.*, 5 U.S.C. § 3301, may issue a directive overriding that regulation.

Pet. App. 20a (footnote omitted). Under 5 U.S.C. 3301, the President may

> (1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;

> (2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and
>
> (3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

5 U.S.C. 3301. These statutory powers authorize the executive action at issue in this case.

Petitioners contend (Pet. 9) that only subsection (1) of Section 3301 "could have any bearing on the President's authority to debar a class of individuals from federal employment." That contention is incorrect. As the court of appeals recognized, "[u]nder 5 U.S.C. § 3301, Congress has delegated broad authority to the President to establish the qualifications and conditions of employment for civil servants within the executive branch." Pet. App. 20a (quoting *American Federation of Gov't Employees* v. *Hoffman*, 543 F.2d 930, 938 (D.C. Cir. 1976), cert. denied, 430 U.S. 965 (1977)). Thus, subsection (2) also supports the President's directive. By determining that reemployment of fired strikers "would be detrimental to the efficiency of operations at the [FAA] and to the safe and effective performance of our national air traffic control system" (Pet. App. 9a), President Reagan exercised his statutory authority to "ascertain the fitness of applicants as to * * * character * * * and ability for the employment sought." 5 U.S.C. 3301(2).

Petitioners' argument that subsection (1) is inapposite because it applies only to the promulgation of regulations is equally unpersuasive. Following the D.C. Circuit's reasoning in *Hoffman*,[3] the court of appeals in

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[3] Petitioners' attempt to distinguish *Hoffman* is unavailing. Although petitioners assert that the plaintiffs in *Hoffman* were challenging the statutory authority of the Civil Service Com-

this case properly "recognize[d] the obvious intent of Congress [in passing 5 U.S.C. 3301] to confer broad discretion upon the President and the CSC."[4] *Hoffman*, 543 F.2d at 938. The broad authority delegated to the President in Section 3301 extends to the challenged debarment policy, whether or not OPM issued a regulation.

3. Petitioners do not, nor can they, allege a conflict among the courts of appeals with respect to the issues they raise. In fact, the Federal Circuit has reached the same conclusion as the court of appeals in this case with respect to virtually identical claims by fired controllers. See *Korte* v. *OPM*, *supra*; *Wagner* v. *OPM*, 783 F.2d 1042, cert. denied, 477 U.S. 906 (1986); *Meyer* v. *OPM*, 767 F.2d 868, 870 (1985). In addition, President Clinton's 1993 decision to lift the debarment challenged by petitioners eliminates any continuing national significance for these issues.

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mission (CSC) to enact regulations, the *Hoffman* plaintiffs were actually challenging the CSC's letter agreements authorizing Air Force and Army Reserve Technician programs and "the subsequent CSC manuals elaborating the qualifications and conditions of employment for those programs." 543 F.2d at 938.

[4] OPM has now assumed the duties that the CSC exercised in *Hoffman*. See 5 U.S.C. 1103(a)(5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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